into two parts, hearing on a broader view and later, if necessary, on facts, does not go to make a hearing as perfect as it would be desirable for a proper adjudication of the appeal. If parties know that once they obtain special leave without limitations they will be free to argue on facts, they will come prepared and will present the case as best as possible for their clients, and the Court too would be in a better position to decide.

Of course, after hearing the appeal fully, this Court is in the best position as to how to dispose of the appeal. It can surely dispose of it by merely stating that it sees no reason to consider the findings of fact to be incorrect or it may consider those findings and express a different opinion.

I would, however, as stated earlier, not like to express anything with respect to how such an appeal be heard by this Court, when it is not doubted that this Court has full discretion to hear an appeal on facts and law and has, for similar reason laid down that the High Court has full power to review evidence when hearing an appeal against acquittal under s. 423 Cr. P.C.

Appeal dismissed.

BADAT AND CO.

v.

EAST INDIA TRADING CO.

(K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.)

Foreign Award and Judgment—Suit filed in Bombay High Court—Jurisdiction of Court to entertain the suit based on such documents.

The respondent company, which was incorporated in New York and carried on business in spices, brought a suit in the original side of the Bombay High Court against the appellant for recovery of a sum of Rs. 92,884-4-10 on the basis of a judgment of the Supreme Court of the State of New York affirming two awards obtained by it and also on the awards in the alternative.

1963

Badat and Company v. East India Trading Company

The respondent was a partnership firm carrying on import and export business in Bombay. By two letters exchanged between them, the appellant and the respondent agreed to do business in turmeric fingers on the terms and conditions of the American Spice Trade Association, one of which was an arbitration clause which ran as follows :—

> "All questions and controversies and all claims arising under this contract shall be submitted to and settled by Arbitration under the Rules of the American Spice Trade Association printed on the reverse side thereof. This contract is made as of in New York."

The appellant failed to supply turmeric in terms of the two contracts it entered into with the respondent. The respondent put the matter into arbitration in pursuance of the arbitration clause. The appellant took no part in it. The arbitrators gave the two awards in favour of the respondent for damages. The appellant did not pay. The respondent then took appropriate proceedings and got the awards confirmed by the judgment of the Supreme Court of the State of New York. The single Judge of the Bombay High Court who tried the suit held that it was not maintainable either on the foreign judgment or on the awards and dismissed the suit. The Division Bench on appeal held that the suit was maintainable on the awards, though not on the judgment, as part of the cause of action had arisen in Bombay and the relevant facts had been proved by the Public documents produced by the respondent and the admissions made by the appellant and decreed the suit.

Held, (per Dayal and Mudholkar JJ.) The decision of the Single Judge of the High Court that the suit was not maintainable on the foreign judgment must be affirmed but on other grounds.

Apart from the provisions of the Arbitration Protocol and Conventions Act, 1937, foreign awards and foreign judgments based upon award are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the Common Law on grounds of justice, equity and good conscience. On the original side of the Bombay High Court English Common Law is also applicable under cl. 19 of the Letters Patent read with cl. XLI of the Charter of that Court.

If the award is followed by a judgment which is rendered in a proceeding in which the person against whom judgment is sought can take objections as to the validity of the award, the judgement will be enforceable in England. Even then the plaintiff will have the right to sue on the original course of action. Secondly, even a foreign award will be enforced only if it satisfies *mutatis mutandis* the tests applicable to the enforcement of foreign judgments on the ground that it creates a contractual obligation arising out of submission to arbitration. But there is a difference of opinion in this connection on two matters, (1) whether an award which

is followed by a judgment can be enforced as an award or whether the judgment alone can be enforced, and (2) whether an award which is not enforceable in the country in which it was made without an enforcement order or a judgment, can be enforced or in such a case the only remedy is to sue on the original cause of action. Thirdly, both a foreign judgment and a foreign award may be sued upon provided certain conditions are fulfilled one of which is that it has become final.

Although, therefore, the respondent could sue on the original cause of action in the Bombay High Court that cause of action must be distinguished from the one furnished by the judgment of the New York Supreme Court which must be held to have arisen in New York and not in Bombay and was a cause of action independent of the one afforded by the contracts and the Bombay High Court would, consequently, have no jurisdiction to try the suit based on that judgment.

East India Trading Co. v. *Carmel Exporters & Importers Ltd.*, (1952) 2 Q. B. 439, *Schibsby* v. *Westenholz.*, (1870) 6 Q. B. 155 and *Re Davidson's Settlement Trust,* (1873) L. R. 15 Eq. 383, referred to.

In a suit based on a foreign award the plaintiff has to prove, (1) that the contract between the parties provided for arbitration by a tribunal in a foreign country, (2) that the award is in accordance with the agreement, (3) that the award is valid according to the law of that country (4) that it was final according to that law and, (5) that it was subsisting award at the date of the suit.

The essential difference between a foreign judgment and a foreign award is that while the former is a command of the foreign sovereign and the comity of nations accords international recognition to it if it fulfils certain basic requirements, the latter is founded on the contract between the parties and is not given the status of a judgment in the country in which it is made and cannot claim the same international status as the act of a foreign sovereign.

Even though an award may not have obtained the status of judgment in the country in which it is made, if it possesses the essential attribute of a judgment, that is finality, it can be sued upon in another country.

Union Nationaledes Cooperatives Agricoles de Careales v. *Robert Catterall & Co. Ltd.*, (1959) 2 Q. B. 44, referred to.

But the finality that r. 15, cl. (E) of the American Spice Trade Association gives to the awards in question is no more than a matter of contract between the parties and must be subject to the law of the State.

A reference to the laws of the State of New York makes it abundantly clear that the relevant provisions of the laws of the

1963

Badat and Company v. *East India Trading Company*

State under which alone the awards could become final had not been complied with and they could not, therefore, provide a cause of action for the suit.

For an award to furnish a fresh cause of action, it must be final. If the law of the country in which it was made gives finality to the judgment based on an award and not to the award itself, the award cannot furnish a cause of action in India. Although the High Court of Bombay has jurisdiction to enforce a final award made in a foreign country in pursuance of a submission made within the limits of its original jurisdiction, the awards in question not being final the suit must fail.

Per Subba Rao J.—The doctrine of non-merger of the original cause of action with the foreign judgment pronounced upon it is a well established doctrine.

Popat v. *Damodar,* (1934) 36 B.L.R. 844, *Oppenheim and Co.* v. *Mohmed Haneef,* (1922) I.L.R. 45 Mad. 496 and *Nil Ratan Mukhopadhya* v. *Cooch Behar Loan Office, Ltd.* I.L.R. (1941) 1 Cal. 171, referred to.

If the contract does not merge in the judgment, by a parity of reasoning an award on which a foreign judgment is passed cannot also merge in the judgment.

There is no distinction between a foreign award which would require an enforcement order to be enforceable in law and an award which cannot be enforced except by a judgment. An enforcement order as well as a judgment on an award serves the same purpose and they are two different procedures for enforcing an award.

Meerifield Ziegler & Co. v. *Liverpool Cotton Association Ltd.,* (1911) 105 L.T.R. 97, referred to.

A suit would, therefore, lie on a foreign award completed according to the law of that country and before a decree can be passed on it three things must be proved, (1) arbitration agreement, (2) that the arbitration was conducted in accordance with the agreement, and (3) that the award was valid according to the law of the country when it was made.

Norske Atlas Insurance Co. Ltd. v. *London General Insurance Company Limited.* (1927) 43 T.L.R. 541, referred to.

It was not correct to say that the High Court had gone wrong in holding that the three necessary conditions had been proved by the admission of the appellants in their pleadings.

Rules 3, 4 and 5 of the Order VIII of the Code of Civil Procedure form an integrated code dealing with the manner in which the allegations of fact made in a plaint has to be traversed and the legal consequences that follow from its non-compliance.

The written statement must deal specifically with each allegation of fact made in the plaint and if the defendant denies any such fact, such denial must not be evasive, he must answer the point of substance and if he fails to do so the said fact must be taken to be admitted.

The discretion under the proviso to r. 5 has to be exercised by the court as justice demands and particularly according to the nature of the parties, standard of drafting prevailing in the locality and the practice of the court.

There can be no doubt that pleadings on the original side of the Bombay High Court have to be strictly construed in the light of the said provisions unless the court thinks fit to exercise it discretion under the proviso.

Tildesley v. *Harper,* (1878) L.R. 7 Ch. D. 403 and *Laxminarayan v. Chimniram Girdharilal,* (1917) I.L.R. 41 Bom. 89, referred to.

The said three conditions were also proved by the exhibited record of the proceedings of the Supreme Court of New York containing the certificate of the Consul General of India in New York and certified copies of the order and judgment of the Supreme Court.

While under s. 78(6) of the Indian Evidence Act, proof of the character of the document according to the law of the foreign country, is condition precedent to its admission, such admission is not a condition precedent for drawing the requisite presumption under s. 86 of the Act. That presumption can be drawn before the document is admitted. The judgment of the Supreme Court of New York, therefore, which satisfied the first two conditions laid down by s. 78(6), could be legitimately admitted into evidence.

The contracts between the parties having been concluded within the local limits of the original jurisdiction of the Bombay High Court, a part of the cause of action must have arisen there, and that court had jurisdiction to try the suit on the awards.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 39 of 1961.

Appeal from the judgment and decree dated September, 1958 of the Bombay High Court in Appeal No. 13 of 1958.

C.K. Daphtary, Solicitor-General of India, S.N. Andley, Rameshwar Nath, P.L. Vohra and *J. B. Dadachanji,* for the appellant.

M. C. Setalvad, Atul Setalvad, V.J. Merchant and *G. Gopalkrishnan,* for the respondent.

1963

Badat and Company
v.
East India Trading Company

Subba Rao J.

May 10, 1963.—Subba Rao J., delivered a dissenting Opinion. The judgment of Dayal and Mudholkar JJ., was delivered by Mudholkar J.

SUBBA RAO J.—I regret my inability to agree with the judgment prepared by my learned brother Mudholkar J.

This appeal by certificate raises the question of jurisdiction of the Bombay High Court to entertain a suit on an award in respect whereof a judgment was made in a foreign court and other incidental questions.

The facts that have given rise to the present appeal may be briefly stated. I shall only narrate such facts which are relevant to the question raised, for in the pleadings a wider field was covered, but it has gradually been narrowed down when the proceedings reached the present stage. The appellants are Badat & Co., a firm formerly carrying on business at Bombay. The respondents, East India Trading Co., are a private limited company incorporated under the laws of the State of New York in the United States of America and having their registered office in the State of New York. The respondents instituted Suit No. 71 of 1954 against the appellants in the High Court of Judicature at Bombay, in its Ordinary Original Civil Jurisdiction, for the recovery of a sum of Rs. 92,884/4/10 with interest thereon. It was alleged in the plain that by correspondence, the details whereof were given in the plaint, the appellants agreed to do business with the respondents on the terms of the American Spice Trade Association contract. Thereafter, by subsequent correspondence the parties entered into two different contracts whereunder the appellants agreed to sell to the respondents different quantities of Allepey Turmeric Fingers on agreed terms. Though the respondents forwarded to the appellants in respect of the said transactions two contracts in duplicate on the standard form issued by the said Trade Association with a request to the appellants to send them after having duly signed, the appellants failed to do so. Under the terms and conditions of the said Trade Association Contract, all claims arising under the contract should be submitted to, and settled by, arbitration under the rules of the said Association. It was stated that pursuant to a relevant rule of the

said Association, the dispute was referred to arbitration and two awards were made in due course *i.e.,* on July 12, 1949. Following the procedure prescribed for the enforcement of such awards in New York, the respondents initiated proceedings in the Supreme Court of the State of New York to have the said awards confirmed and a judgment entered thereon in the said Court. In due course, the said Court pronounced judgment confirming the said awards. On those allegations a suit was filed in the High Court of Bombay for recovery of the amounts payable under the said two awards by the appellants to the respondents. The suit was tried, in the first instance, by Mody J. The learned Judge, *inter alia,* held that the suit on the foreign judgment would not lie in the Bombay High Court, as there was no obligation under the said judgment for the appellants to pay any amount to the respondents at any place within the jurisdiction of the Bombay High Court. Adverting to the claim based on the agreement resulting in the awards, the learned Judge observed that there was no proof of such agreement and that there were no admissions in the written-statement in regard to the facts sustaining such an agreement. On those findings he held that the respondents had failed to prove that the Bombay High Court had jurisdiction to try the suit. As the suit was heard on merits also, he considered other issues and held that there was neither proof nor admissions in the written-statement in regard to the alleged contracts. He found that the arbitrators and the umpire had jurisdiction to make the awards, but the said awards merged in the judgment and that the suit was not maintainable on the said two awards. It is not necessary to give the other findings of the learned Judge, as nothing turns on them in the present appeal. In the result, the suit was dismissed with costs. On appeal, a division Bench of the said High Court, consisting of Chagla C.J. and S. T. Desai J., disagreed with Mody J., on the material questions decided by him and allowed the appeal with costs. The learned Judges held that the awards did not merge in the judgment, that the suit on the awards was maintainable and that the Bombay High Court had jurisdiction to entertain the suit as part of the cause of

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

action arose within its limits. The learned Judges further held that all the facts necessary to sustain the respondents' suit on the awards had been proved either by public documents produced in the case or by the admissions made by the appellants in the written-statement. The present appeal, as aforesaid, has been preferred by certificate against the judgment of the division Bench.

The learned Solicitor General, appearing for the appellants, raised before us the following points: (1) The awards merged in the judgment made by the Supreme Court of the State of New York and, therefore, no suit would lie on the awards. (2) Even if the suit could be filed on the awards, it was not proved that any part of the cause of action accrued within the jurisdiction of the Bombay High Court. To state it differently, the respondents have not proved that the agreements resulting in the awards were entered into or concluded within the jurisdiction of the Bombay High Court. And (3) the respondents failed to prove the three necessary conditions for the enforcement of the awards namely, (i) that there was an arbitration agreement, (ii) that the arbitration was conducted in accordance with the agreement, and (iii) that the awards were made pursuant to the provisions of the agreement and, therefore, valid according to the *lex fori* of the place where the arbitration was carried out and where the awards were made.

Mr. Setalvad appearing for the respondents, sought to sustain the findings of the Division Bench of the High Court given in favour of the respondents on the said questions raised by the appellants.

The first question is whether the awards merged in the judgment of the Supreme Court of the State of New York for all purposes; if so, the awards would lose their individuality or separate existence and no suit could, therefore, be filed to enforce them. In Halsbury's *Laws of England,* Vol. 7, 3rd Edn., at p. 141, the relevant principle is stated under the heading "Foreign Judgments" thus:

> "Since the foreign judgment constitutes a simple contract debt only, there is no merger of the original cause of action, and it is therefore open to the plain-

tiff to sue either on the foreign judgment or on the original cause of action on which it is based, unless the foreign judgment has been satisfied."

The same idea is expressed in Dicey's *"Conflict of Laws"*, 7th edn., at p. 1059:

> "For historical and procedural reasons, a foreign judgment is treated in England as a contractual debt, and the fact that, in certain instances, it can be enforced by registration does not appear to alter the traditional view."

Though the learned author in the course of his commentary criticizes this view, the passage represents the accepted view on the subject. An interesting discussion of the evolution of the rule of non-merger of the cause of action in the foreign judgment is found in Piggott's *"Foreign Judgment"*, Part I at p. 17. The various steps in its evolution may be stated thus: (1) Action brought on a foreign judgment was an action brought to recover the judgment debt: ..... necessarily then, the judgment must be evidence of the debt. (2) It was not made clear which debt it evidenced, whether it was the judgment debt or the original debt. (3) As it was an action on a debt, an action on the judgment debt soon came to be confused with, and perhaps looked upon as, an action on the original debt. (4) Having come to that stage, the courts declared that the original debt or cause of action had not merged in the foreign judgment pronounced upon it. Whatever may be the origin, the doctrine of non-merger of the original cause of action with the foreign judgment has now been well established in spite of the fact that some text-book writers are not able to discover a logical basis for the doctrine. In "Smith's *Leading Cases"*, the learned author says:

> "Foreign judgments certainly do not occasion a merger of the original ground of action."

In Cheshire's *Private International Law*, 5th Edn., the learned author says in Ch. XVII under the heading "Foreign Judgments", thus, at p. 598:

> "It is a rule of domestic English law that a plaintiff who has obtained judgment in England against a defendant is barred from suing again on the original cause of action. The original cause of action is mer-

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

ged in the judgment—*transit in rem judicatum*—and it would be vaxatious to subject the defendant to another action for the purpose of obtaining the same result. It has been held, however, in a series of authorities, that this is not so in the case of foreign judgments. Such a judgment does not, in the view of English law, occasion a merger of the original cause of action, and therefore the plaintiff has his option, either to resort to the original ground of action or to sue on the judgment recovered, provided, of course, that the judgment has not been satisfied."

The learned author gives the following different reason for this distinction between a foreign and a domestic-judgment, at p. 599:

> "The most plausible justification for non-merger, perhaps, is that a plaintiff suing in England on a foreign judgment, as contrasted with one who sues on an English, judgment possesses no higher remedy than he possessed before the foreign action. The effect of judgment in English proceedings is that "the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher"; but the view which English law takes of a foreign judgment is that it creates merely a simple contract debt between the parties. The doctrine of non-merger has, however, been too often repeated by judges to justify any prospect of its abandonment."

This doctrine has been accepted and followed by Indian Courts: see *Popat* v. *Damodar*(1), *Oppenheim and Company* v. *Mahomed Haneef*(2) and *Nil Ratan Mukhopadhyaya* v. *Cooch Behar Loan Office, Ltd.*(3).

If the contract does not merge in a judgment, by parity of reasoning, the award on which a foreign judgment is made cannot also merge in the judgment. While conceding the said legal position, the learned counsel for the appellant contends that the award to furnish a valid cause of action shall be one which is legally enforceable in the country in which it is made. An award made in

(1) (1934) 36 B.L.R. 844, 853. (2) (1922) I.L.R. 45 Mad. 496.
(3) I.L.R. (1941) 1 Cal. 171, 175.

New York, the argument proceeds, by its own force does not create rights or impose liabilities thereunder and therefore, such an inchoate document cannot afford a cause of action. This contention has not been raised for the first time, but has been noticed in *"Russel On Arbitration"*, 16th Edn. and answered at p. 282. The learned author places the following two propositions in juxtaposition: (1) "An award made by foreign arbitrators, which requires an enforcement order to render it enforceable by the local law, is not a judgment of a foreign tribunal which can be enforced by action in English courts". (2) "But an award which is complete and could be enforced in the country where it was made is enforceable in England at Common Law, quite apart from any rights given by Part II of the Act." In *Halsbury's Laws of England*, Vol. II 3rd edn., the following note is given at p. 52:

> "A foreign arbitration award which is complete and enforceable in the country in which it was made is enforceable in England at Common Law."

The learned Solicitor-General seeks to draw a subtle distinction between an award made by foreign arbitrators which require an enforcement order to render it enforceable by the local law and an award which could not be enforced except by obtaining a judgment on its basis. On this distinction an argument is advanced, namely, that in the case of the former award, the award has been vitalized by the enforcement order, while in the case of the latter the award *qua* the judgment has not become enforceable, but it is the judgment that becomes enforceable. In support of this contention reliance is placed upon the following observations found in *Dicey's Conflict of Laws*, 17th edn., at p. 1059:

> "If the foreign award is followed by judicial proceedings in the foreign country resulting in a judgment of the foreign court which it not merely a formal order giving leave to enforce the award, enforcement proceedings in England must be brought on the foreign judgment (or possibly on the original cause of action), but probably not on the award."

These observations are not supported by any direct decision; they represent only the author's doubts on the

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

question. On principle I cannot see why a distinction should be made between the two categories of cases. An enforcement order as well as a judgment on an award serves the same purpose : they are two different procedures prescribed for enforcing an award. In the case of an enforcement order a party applies to a court for leave to enforce the award ; and on the granting of such leave, the award can be enforced as if it were a decree of a court. In the alternative procedure, an action either in the shape of a suit or a petition will have to be filed on an award and a judgment obtained thereon. In that event, the award, *vis-a-vis* the country in which it is made, merges in the judgment and thereafter the judgment only becomes enforceable. But, as explained earlier, there is no merger in the context of its enforcement in another country. In both the cases the award in the country of its origin is complete and enforceable. If an award gets vitality by a mere enforcement order, it gets a higher sanctity by the court of its origin making a judgment on it. Both of them afford a guarantee of its vitality and enforceability in the country of its origin and, therefore, a different country can safely act upon it. In both the cases the award is complete in the country of its origin and if the doctrine of merger cannot be invoked in the case of foreign judgment, as I have held it cannot, there is no principle on which the distinction sought to be made can be sustained. To sanction the distinction in the context of a foreign judgment is to prefer the form to substance and to accept a lesser guarantee and reject a higher one. The decision in *Merrifield, Ziegler, and Co.,* v. *Liverpool Cotton Association Limited*(1) does not lay down any different proposition. There, the plaintiff brought an action in England against Liverpool Cotton Association for restraining the said Association from expelling them from membership of the Association. The Association filed a counter claim demanding a large amount from the plaintiffs payable by them under an award made in Germany. The claim was based on the award and in effect it was a claim to enforce the award. By German Law an enforcement order

(1) (1911) 105 L.T.R. 97, 106.

was necessary before an award can be enforced. But no such order was made there. The High Court rejected the counter claim. In doing so, it made the following observations :

> "The sole point, therefore, remains whether the award is a decision which the court here ought to recognize as a foreign judgment. In my opinion it is not, although as between the parties it is conclusive upon all matters thereby adjudicated upon, and is therefore in a different category to the "remate" judgment dealt with by the House of Lords in *Nouvin* v. *Freeman*(1) ; it has no further force or effect unless and until the court determines that it is an adjudication made in proceedings regularly conducted upon matters really submitted to the jurisdiction of the tribunal. It is not even as though the award were enforceable unless the court stays its operation ; the contrary is really the case, and for all practical purposes it is still born until vitality is infused into it by the court. It is then, for the first time, endowed with one, at least, of the essential characteristics of a judgment—the right to enforce obedience to it."

This passage in clear terms brings out the principle underlying the proposition that an award cannot afford a cause of action till it is complete in the country of its origin. The reason of the rule is that unless and until the appropriate court determines its regularity, it is inchoate and it becomes enforceable only when an enforcement order or judgment puts its seal of approval on it. For the application of this principle the distinction between an enforcement order and a judgment on the award is not material. In either case, the Court approves it. Indeed, the Judicial Committee in *Oppenheim & Co.* v. *Mahomed Hanef*(2) sanctioned the maintainability of a suit to enforce an award which ended in a judgment. There, in respect of a mercantile dispute that arose between merchants carrying on business in London and a merchant at Madras, an award was obtained in England. The merchants in England filed a suit on

(1) (1889) 15 App. Cas. 1. (2) (1922) I.L.R. 45 Mad. 496.

1963

Badat and Company v. East India Trading Company

Subba Rao J.

the award on the King's Bench Division of the High Court in England for the amounts payable thereunder and obtained an *ex-parte* judgment against the merchant at Madras. Thereafter, they brought a suit against the Madras merchant in the High Court of Judicature at Madras claiming the sum due under the said judgment, or in the alternative, for the amount due under the award. Coutts Trotter J., who heard the case in the first instance, held that the suit was not maintainable on the judgment that was an *ex-parte* one, and gave a decree on the award. But on appeal, a Division Bench of that Court took a different view. On further appeal, the Privy Council restored the decree made by Coutts Trotter J.: but they concluded their judgment with the following caution :

> "In order to prevent misconception, it appears desirable to add that it was not pleaded or contended at any stage of the proceedings that the award had merged in the English judgment, and accordingly their Lordships do not deal with that point."

This decision is certainly an authority for the position that on the assumption that an award does not merge in a foreign judgment, it affords a cause of action in another country. I have already indicated earlier on the same reasoning applicable to the doctrine of non-merger of a contract in a foreign judgment that an award also will not merge. For the reasons given by me, I hold that a suit would lie on the basis of an award in a foreign country, provided it is completed in the manner prescribed by the law of that country.

I shall now take the third question, for the discussion thereon would also solve the problem raised by the second question. The learned Solicitor-General contends that there is no proof of the facts to satisfy the aforesaid three conditions and the Division Bench of the High Court went wrong in holding to the contrary on the basis of the alleged admissions found in the pleadings. Mr. Setalvad, learned counsel for the respondents, on the other hand, while conceding that the said three conditions must be satisfied before a foreign award can be enforced, argues that the relevant facts were proved not only by the admissions made by the appellants in the written-statement, ex-

pressed or implied, but also by the production of the certified copy of the judgment of the foreign court.

In *Norake Atlas Insurance Co. Ltd.* v. *London General Insurance Company Limited*(1), an award made in Norway was sought to be enforced in England. Action was brought not on the contract but on the award. MacKinnon J., laid down in that case that three things had to be proved for obtaining a decree thereon, namely, (1) the submission; (2) the conduct of the arbitration in accordance with the submission; and (3) the fact that the award was valid according to the law of the country where it was made. So too, in Halsbury's *Laws of England*, 3rd edn., Vol. II, in para 116, at p. 53, the said conditions of enforcement are given with further elaboration. I need not pursue this matter, as there is no dispute on this aspect of the question.

Have the conditions been proved in the present case? I shall first take the arguments based on the pleadings. Before doing so, it would be convenient to read the relevant provisions of the Code of Civil Procedure on the subject, as the arguments turn upon the application of those provisions to the pleadings.

Order VII of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing that the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order VIII provides for the filing of a written-statement, the particulars to be contained therein and the manner of doing so; rules 3, 4 and 5 thereof are relevant to the present enquiry and they read:

> *Order VIII Rule* 3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. r. 4 Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he

(1) (1927) 43 T.L.R. 541.

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Rule 5. Every allegation of fact in the plaint, if not denied specifically, or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. The written-statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first paragraph of r. 5 is a re-production of O.XIX, r. 13, of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. To do justice between those parties, for which Courts are intended, the rigor of r. 5 has been modified by the introduction of the proviso thereto. Under that proviso the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably relying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice. But on the Original Side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional

circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. The discretion under the proviso must be exercised by a Court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a Court wherein such pleadings are filed. In this context the decision in *Tildesley* v. *Harper*(1) will be useful. There, in an action against a lessee to set aside the lease granted under a power the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. The Court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and therefore it must be deemed to have been admitted. Fry J. posed the question thus: What is the point of substance in the allegations in the statement of claim? and answered it as follows:

> "The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met..... no fair and substantial answer is, in my opinion, given to the allegation of substance, namely that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhered to strictly, and that the Court should require the Defendant, when putting in his statement of defence, and the Plaintiff, when replying to the allegations of the Defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the Court."

(1) (1878) L.R. 7 Ch. D. 403.

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

It is true that in England the concerned rule is inflexible and that there is no proviso to it as is found in the Code of Civil Procedure. But there is no reason why in Bombay on the original side of the High Court the same precision in pleadings shall not be insisted upon except in exceptional circumstances. The Bombay High Court, in *Laxminarayan* v. *Chimniram Girdhari Lal*(1), construed the said provisions and applied them to the pleadings in a suit filed in the court of the Joint Subordinate Judge of Ahmednagar. There the plaintiffs sued to recover a sum of money on an account stated. For the purpose of saving limitation they relied in their plaint upon a letter sent by the defendant-firm. The defendants in their written statement stated that the plaintiffs's suit was not in time and that "the suit is not saved by the letter put in from the bar of limitation". The question was raised whether in that state of pleadings, the letter could be taken as admitted between the parties and, therefore, unnecessary to be proved. Batchelor, Ag. C. J., after noticing the said provisions, observed :

> "It appears to us that on a fair reading of paragraph 6, its meaning is that though the letter put in by the plaintiff is not denied the defendants contend that for one reason or another its effect is not to save the suit from the bar of limitation. We think, therefore, that.....the letter, Exhibit 33, must be accepted as admitted between the parties, and therefore, unnecessary to be proved."

The written statement before the High Court in that case was one filed in a court in the mofussil ; yet, the Bombay High Court applied the rule and held that the letter need not be proved *aliunde* as it must be deemed to have been admitted in spite of the vague denial in the written statement. I, therefore, hold that the pleadings on the original side of the Bombay High Court should also be strictly construed, having regard to the provisions of rr. 3, 4 and 5 of Order VIII of the Code of Civil Procedure, unless there are circumstances wherein a Court thinks fit to exercise its discretion under the proviso to r. 5 of O.VIII.

The first condition for the enforceability of an award

(1) (1917) I.L.R. 41 Bom. 89, 93.

is the proof of submission to arbitration. A claim based on an award is in effect a claim to enforce the award on the footing that the submission implied a contract to give effect to the award. In the plaint the details of the preliminary contract between the parties containing an arbitration clause has been specifically and precisely stated in paras 2 and 3. As much of the argument turns upon the said allegations, it may conveniently be read here.

"2. By their letter dated 7th September 1948 the plaintiffs intimated to the defendants that they were prepared to do business with them on the terms of the American Spices Trade Association contract, net landed weights, less $1\frac{1}{2}$ per cent. discount, letter of credit to be opened for 95 per cent. of the amount of the transaction and the balance to be settled immediately after the goods were weighed and delivered and if there was any difference in the plaintiffs' favour the same was to be remitted to them by the defendants by telegraph. By their letter dated 13th September, 1948 the defendants agreed to the said terms. Thereafter by their cable dated 3rd March, 1949 the defendants offered to sell to the plaintiffs 30 tons of Alleppey Turmeric Fingers at $22\frac{1}{2}$ cents per lb. C. & F. New York less 2 per cent March/April shipment. On the same day the plaintiffs cabled to the defendants their acceptance of the said offer. By their cable dated 7th March, 1949 the defendants offered to sell to the plaintiffs further 30 tons of Alleppey Turmeric Fingers at 22 cents per lb. C. & F. New York less 2 per cent March/April shipment. On the same day the plaintiffs cabled to the defendants their acceptance of the said offer. By their letter dated 8th March 1949 the defendants confirmed the said contract arrived at between the parties on 3rd March, 1949. By their letter dated 9th March, 1949 the plaintiffs confirmed both the said contracts and further intimated to the defendants that they had opened the necessary letters of credit. The plaintiffs forwarded to the defendants in respect of the said transactions two contracts in duplicate on the standard form issued by the said American Spice Trade Association with a request to the defendants to return to the plaintiffs a copy of each of them

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

after signing the same. The defendants, however, failed and neglected to do so. The plaintiffs crave leave to refer to and rely upon the cables and letters above referred to and standard form of contract issued by the said American Spice Trade Association, when produced."

"3. The plaintiff say that the standard form of contract issued by the said American Spice Trade Association is known in the spice and herb market as "The American Spice Trade Association Contract" and contains terms and conditions on which the defendants had agreed to do business with the plaintiff as aforesaid. The plaintiff further say that the said standard form of contract is in common use with firms dealing in spices and herbs both in the New York market and elsewhere. The plaintiff further say that the defendants have been dealing in spices and herbs with American firms in the United States and also on the United States market and had previously entered into several American Spice Trade Association Contracts and were well aware of and knew what the terms and conditions of the said American Spice Trade Association Contract were. One of the said terms was as follows :—

> "All questions and controversies and all claims arising under this contract shall be submitted to and settled by Arbitration under the Rules of the American Spice Trade Association printed on the reverse side hereof. This contract is made as of in New York."

Then the plaint proceeds to give how the dispute should be referred to arbitration and how arbitrators and umpire should be appointed by the parties. From the said allegations in the plaint it is clear that the plaintiffs have precisely and definitely given the particulars of the correspondence that passed between the parties on the basis of which they claimed the preliminary contract containing an agreement to submit their dispute to arbitration and the subsequent contracts in respect of the goods made and concluded between the parties.

The defendants, adverting to the said allegations dealt with them in paragraphs 7 and 8 of their written state-

ment. The said paragraphs read :

> "7. With reference to paragraph 2 of the plaint the defendants deny that they at any time entered into any contract with the plaintiff as alleged in the said paragraph or otherwise. The defendants deny that they at any time signed or were bound to sign a standard form of contract issued by the American Spice Trade Association."
>
> 8. With reference to paragraph 3 of the plaint, the defendants deny that they at any time agreed to do any business or enter into any contract with the plaintiffs as alleged therein or otherwise. The defendants say that they did not at any time sign nor were they bound to sign the said American Spice Trade Association Contract and that they are not therefore bound by or concerned with the terms and/or conditions of the said contract. The defendants deny the rest of the statements contained in the said paragraph."

It will be seen from the said paragraphs that though the defendants denied that at any time they entered into a contract with the plaintiffs as alleged in the plaint or otherwise, they have not denied that the letters particularized in the plaint passed between the parties. Learned Solicitor-General relied upon the expression "as alleged" in paragraphs 7 and 8 of the written statement and contended that the said words implied necessarily that the defendants denied the passing of the correspondence. No such necessary implication can arise from the use of the said expression. That expression is consistent with the admission by the defendants of the passing of the letters mentioned in paragraphs 2 and 3 of the plaint, coupled with a denial that such correspondence does not constitute a binding contract between them. Indeed, rr. 3 and 4 of O. VIII are aimed at such general allegations in written statements. Rule 3 demands that each allegation of fact made in the plaint must specifically be denied and r. 4 emphasizes that such a denial shall be of the point of substance and shall not be vague. Here, in the plaint the contents of the letters dated September 7, 1948, September 13, 1948, March 8, 1949 and March 9, 1949 are given and it is specifically stated that they passed between the parties. Nowhere in the written statement there is a denial as regards the

1963

Badat and Company
v
East India Trading Company

Subba Rao J.

passing of the letters or the contents of those letters. The general and vague allegations in the written statement cannot possibly be construed, expressly or by necessary implication, as a denial of the specific allegations in the plaint in regard to the said correspondence. On this aspect of the case, to some extent, there is unanimity between Mody J., and the learned Judges of the Division Bench of the Bombay High Court. Adverting to para 7 of the written statement, Mody, J., says :

> "In my opinion, paragraph 7 of the written statement does not at all, directly or indirectly, specifically or by implication, deal with any of the said three statements of facts. A denial of a contract is not a denial of the receipt or of the contents of the said letter dated 7th September 1948 or the writing of the letter dated 13th September 1948. The defendants can conceivably admit the said three statements of fact but still deny that any contract resulted thereby. Therefore the said three statements of facts must be deemed to have been admitted."

Dealing with para 8 of the written statement, the learned Judge says that these two statements of facts have not been pleaded to in the written statement and must, therefore, be deemed to have been admitted. But having gone so far, the learned Judge rules against their admissibility on the ground that there are no allegations that the defendants wrote the letters attributed to them and that there is no description of the contents of the letters. This, if I may say so, is rather hypercritical. The allegations in para 2 of the plaint in express terms say that the letters emanated from the defendants and also give their gist. The Division Bench of the High Court in the context of the said denials said :

> "Therefore, there is no denial of this correspondence. Indeed there could not be, because before the Written Statement was filed inspection was given by the plaintiffs of this correspondence and again the conscientious draftsman of the written statement could not possibly have controverted the statement that these letters passed between the parties. Therefore, in our opinion, these two letters of the 7th September, 1948 and 13th September, 1948 are admissible in evidence,

and we will formally admit them in evidence."

Then they proceeded to state :

> "Now, we read this denial to mean not a denial of the exchange of letters and telegrams, not a denial of the correctness of the copies of the documents of which the Defendants have taken inspection, but a submission in law that no contract emerges from the exchange of these letters and telegrams.

For the reasons already given by me, I entirely agree with the view expressed by the Division Bench on the interpretation of the pleadings and hold that the said letters have been rightly admitted in evidence. If the said letters can go in as evidence, the first condition, namely, the factum of submission has been proved in this case.

As regards the question whether the arbitration was conducted in accordance with the submission, the pleadings again afford the answer. In paras 3, 4 and 5 of the plaint it is specifically stated that the parties agreed to the arbitration clause and to the procedure prescribed for carrying out the arbitration. It is stated therein that pursuant to r. 5 and clauses B, C and E of r. 15 of the Rules of the said American Spice Trade Association, arbitrators and umpire were appointed, that the arbitrators and the umpire subscribed to their oaths of office and proceeded to hear the matter on 27th June, 1949, and 12th July, 1949, that the defendants, though duly notified of the hearings, did not attend the same, that on 12th July, 1949, the said arbitrators and umpire duly made, signed, acknowledged and published their awards and thereby they unanimously held that the defendants had committed a breach of the said two contracts and awarded that the defendants should pay to the plaintiffs specific amounts in respect of the said contracts as and by way of damages. Paragraph 7 of the plaint describes how the defendants did not meet the demand, how proceedings were taken before the Supreme Court of the State of New York, how notice of the said proceedings was duly served on the defendants and how the said Court pronounced its judgment confirming the said awards. Paragraphs 9, 10, 11 and 12 of the written statement deal with the said allegations. In the said paragraphs the defendants do not deny the *factum* of the appointment of arbitrators and the procedure followed by

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

them in making the awards. They are content to say that they are not bound by or concerned with the appointment of the arbitrators by the plaintiffs as alleged therein or otherwise, that they are not bound by or concerned with any of the statements contained in para 7 of the plaint and that the awards passed by the arbitrators and the umpire are not binding on them. As regards the allegations in para 7 they only say that the arbitrators acted without jurisdiction and that the judgment of the Supreme Court of the State of New York made thereon is not binding on them. It will be seen from the said denials that neither the appointment of the arbitrators nor the steps taken by them are denied. If so it must be held, on the same reasoning which I have adopted in the context of the allegations pertaining to submission, that in the absence of specific denials it must be held that it is admitted that the awards were made in strict compliance with the terms of submission.

Now coming to the third condition, namely, the proof of the fact that the awards are valid according to the law of the country where they were made, the same equivocal attitude is adopted by the defendants in their written statement. In para 8 of the plaint there is the following specific allegation in that regard :

> ".....the said arbitration having been duly held and the said awards having been duly made, signed, acknowledged and published according to the said rules and the laws of the State of New York, and the defendants not having taken steps to have the said awards or either of them set aside or modified, as provided in the said rules and by the laws of the State of New York, the said awards are binding on the defendants and the defendants are now precluded and estopped from disputing the same."

Here there is a definite averment that the awards were made according to the laws of the State of New York. In the written statement of the defendants, though they generally deny that the awards are binding on them, there is no specific denial that the awards are not in accordance with the laws of the State of New York. Applying the same rules of construction which I invoked in the case of the other averments in the plaint, I must also hold that the

defendants must be held to have admitted the fact that the awards were made in accordance with the laws of the State of New York.

There is one important circumstance which must be borne in mind in construing the terms of the written statement. It is not disputed that the plaintiffs have filed affidavits disclosing the copies of the documents mentioned in the plaint. The defendants' Advocate had inspection of the said documents before he filed his written statement. It is not disputed that the defendants received a copy of the petition filed by the plaintiffs in the Supreme Court of the State of New York, along with a copy of the awards and the order of the Court to show cause. With the knowledge of the contents of the copies of the letters and the contents of the awards, the Advocate for the defendants rightly and properly was not in a position to deny the factual aspect of the passing of the letters and the making of the awards and the delivery of the judgment by the Supreme Court of the State of New York confirming the said awards. That is why the written statement contained vague and general denials only specifically raising disputes on legal questions, and designedly giving equivocal answers to factual aspects. It is said that no inference of tacit acceptance on the part of the defendants or their counsel can be drawn, for the defendants' Advocate, after inspection of the documents, asked the plaintiffs' Advocate to produce the originals, but the plaintiffs failed and neglected to do so. But this circumstance does not detract from the knowledge of the defendants and their Advocate of the existence of the said documents and their contents before the written statement was drafted. This circumstance gives a satisfactory explanation for the vagueness of the allegations in the written statement of the defendants. They were designedly made vague as the Advocate presumably could not bring himself to go the whole length of denying the facts. I, therefore, hold, on a fair and reasonable construction of the pleadings and written statement that the existence of the three conditions for enforcing the awards have been admitted by the defendants in their pleadings and that, therefore, they need not be independently proved.

I would go further and hold that the said three con-

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

ditions are also proved by Ex. X-9. The said exhibit is the record of proceedings of the Supreme Court of the State of New York relating to the arbitration between the plaintiffs and the respondents. That record contains the certificate issued by the Consul-General, and other papers relating to the proceedings including the order and judgment of the said Supreme Court. The Certificate reads thus :

"THIS IS TO CERTIFY (a) that the annexed proceedings have been duly had in accordance with the laws of the State of New York.

(*b*) that the annexed proceedings are duly certified by the officer having the legal custody of the originals thereof at the time such annexed proceedings were issued by the Supreme Court of New York.

(*c*) that the several persons named in the annexed proceedings as holding the respective offices stated therein in respect of each of them did in fact hold such respective office at the time the same took place.

The Consulate-General of India assumes no responsibility for the contents of this document.

Sd./- M. Gopalcharan

Dated : New York, N.Y.
June 18th, 1957.

CONSUL-GENERAL
Seal of CONSULATE
GENERAL OF INDIA,
New York, N.Y.

The order and judgment of the Supreme Court of New York dated March 21, 1950, give in detail the filing of the application by the respondents for an order confirming the two awards ; the consideration given to the said application by the Court ; the Court's satisfaction, after perusing the awards and the connected papers, that the said proceedings were in all respects regular ; and the terms of the order made on the said application. The decretal portion of the order confirms the awards. The judgment is signed by Archibald R. Watgon, Clerk, and certified both by the said Clerk and the Clerk of the Supreme Court of New York County. If the Judgment goes into evidence, the three conditions are satisfied, namely, that there was

a submission, that the arbitrators gave the awards in terms of the submission and that a judgment was made on those awards on the ground that the awards were made in accordance with law.

But it is argued by the learned Solicitor-General that the said judgment has not been proved in the manner prescribed by the Indian Evidence Act. The relevant sections of the Evidence Act may now be read :

Section 74 : The following documents are public documents :—

(1) documents forming the acts, or records of acts—

. . . . . .

(*iii*) of public officers, legislative, judicial and executive of any part of India or of the Commonwealth or of a foreign country.

Section 78 : The following public documents may be proved as follows :

. . .

(6) Public documents of any other class in a foreign country,

By the original, or by a copy certified by the legal keeper, thereof with a certificate under the seal of a notary public, or of an Indian Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country."

Section 86 : The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty's Dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records....."

It is not disputed that the copy of the judgment is certified by the legal keeper of the original within the meaning of s. 78(6) of the Evidence Act; nor is it contended that there is no certificate under the seal of an Indian Consul certifying that the copy is certified by the officer having

1963

Badat and Company v. *East India Trading Company*

Subba Rao J.

the legal custody of the original. But what is contended is that under s. 78(6) of the Evidence Act three conditions must be complied with before the judgment can be admitted in evidence and the third condition, namely, proof of character of the document according to the law of the foreign country, is not forthcoming in this case. A perusal of s. 78(6) of the Evidence Act makes it clear that apart from the two certificates—one by the legal keeper of the original documents and the other by the Consul-General—there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. It is a condition precedent. The short question, therefore, is whether there is such proof in this case. Proof can be by direct or circumstantial evidence. Proof can also be given by placing before the Court facts giving rise to presumptions, rebuttable or irrebuttable. Section 86 of the Evidence Act lays down that a Court may presume the genuineness and accuracy of any document purporting to be a certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption it is not necessary that the judgment of the foreign country should have already been admitted in evidence. While s. 78(6) of the Evidence Act lays down three conditions for admitting the judgment in evidence, the admission of the judicial record is not a condition precedent for drawing the requisite presumption under s. 86 of the Evidence Act. That presumption may be drawn before the said record is admitted. The document may be looked into for the purpose of ascertaining whether there is the requisite certificate, viz., a certificate issued by any representative of the Central Government in the concerned country to the effect that the said document was certified in the manner commonly in use in that country for the certification of copies of judicial record. If the distinction between the certificate and the judgment is borne in mind, the fallacy of the argument becomes apparent. The requisite certificate makes the document admissible and not *vice versa*. If there was such a certificate forthcoming—in this case there is such a certificate—the document may be presumed to be genuine and accurate. If it is presumed

to be genuine and accurate, it shows its character, *viz.*, that it is a genuine judgment made by the Supreme Court of New York. This is a fit case for raising the said presumption and with the aid of this presumption the third condition is also complied with *i.e.*, it is a judgment of the Supreme Court of the State of New York made in accordance with law. As the three conditions laid down in s. 78(6) of the Evidence Act are fulfilled, the document can legitimately be admitted in evidence, and if it is admitted, the document, by its own force, establishes that the aforesaid three conditions for the enforceability of the awards have been fulfilled.

Now I come to the second contention. This deals with the jurisdiction of the Bombay High Court on its original side to entertain the suit. Clause 12 of the Letters Patent for Bombay enables a party to file a suit with the leave of the Court, if the cause of action arises in part within the local limits of the ordinary original jurisdiction of the said High Court. The cause of action in the plaint is given as follows :

> ".....the terms of business were accepted by the defendants in Bombay and the proposal or acceptance of the said contracts by the defendants took place in Bombay. The defendants' refusal to pay the said sum also took place in Bombay."

On those allegations the leave of the High Court of Bombay was obtained and the suit was filed in the said Court. I have already pointed out that in the case of a claim based on an award, it is in effect a claim to enforce the award on the footing that the submission implied a contract to give effect to the award. I have also held that all the necessary documents relating to the preliminary as well as subsequent contracts are admitted in the written statement. The said documents clearly establish that the parties agreed that their disputes under the contracts should be submitted to arbitration in the manner prescribed by the rules of the American Spices Trade Association. Those contracts were concluded within the local limits of the original jurisdiction of the Bombay High Court. It follows that a part of the cause of action accrued within the said limits and that as the leave of the High Court was obtained, the said High Court had jurisdiction to entertain the

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

claim. No other point is argued before us.

In the result, I agree with the conclusions arrived at by the High Court. The appeal is dismissed with costs.

MUDHOLKAR J.—This is an appeal by a certificate granted by the High Court of Bombay from its judgment dated September 12, 1958 reversing that of Mody J., who, by his judgment had dismissed a suit instituted by the East India Trading Co., respondents before us, against the defendants Badat & Co., on the original side of the High Court for a sum of Rs. 92,884-4-10 with interest and costs on the basis of a judgment of the Supreme Court of New York affirming awards given by a domestic tribunal or alternatively on the awards themselves.

The plaintiff-company was incorporated in the State of New York and among other things, engages in the import of spices. The defendant-company, was a partnership firm and at the relevant time was carrying on import and export business in Bombay. According to the plaintiffs, by two letters dated September 7, 1948, and September 13, 1948, the first written by the plaintiffs and the second by the defendants, the parties agreed to do business upon the terms of the American Spice Trade Association. One of the terms agreed between the parties was that the plaintiffs at the time of placing an order for the supply of spices with the defendants were to open a letter of credit to the extent of 95 per cent of the value of the commodity ordered to be supplied and the balance to be settled immediately after the goods were weighed and delivered. By their cable dated March 3, 1949, the defendants offered to sell to the plaintiffs 30 tons of Alleppey Turmeric Fingers at a certain rate, to be shipped in March/April. This offer was immediately accepted by the plaintiffs. A somewhat similar offer was again made by the defendants to the plaintiffs on March 7, 1949, which offer also was accepted by the plaintiffs. The plaintiffs claim to have forwarded to the defendants in respect of the said transactions two contracts in duplicate on the standard forms issued by the American Spice Trade Association with a request to the defendants to return to them a duly signed

from in respect of each of the transactions and their grievance is that the defendants failed to comply with the request. The plaintiffs further aver that though they opened letters of credit, the defendants committed a breach in respect of both the contracts by failing to supply turmeric.

The plaintiffs have alleged in para 3 of the plaint that the defendants were well aware of and knew what the terms and conditions of the American Spice Trade Association were. One of the terms of the Association which they have set out is as follows:

> "All questions and controversies and all claims arising under this contract shall be submitted to and settled by Arbitration under the Rules of the American Spice Trade Association printed on the reverse side thereof. This contract is made as of in New York."

In pursuance of this term, the plaintiffs who had declared the defendants in default appointed one Edward B. Polak as their Arbitrator and on May 24, 1949, called upon the defendants to appoint an arbitrator on their behalf. They also informed the defendants that if they failed to do so, they, the plaintiffs, would request the Association to appoint an arbitrator on the defendants' behalf. The defendants not having appointed any arbitrator on their behalf, the Association at the plaintiffs' request appointed one Michael F. Corio to act as an arbitrator on the defendants' behalf. This person informed the defendants of his appointment as Arbitrator and requested them to furnish him with all documents and information which might be necessary or useful in the matter of arbitration and further informed them that in the absence of such documents and information the Arbitrators will have to proceed with the arbitration upon the documents and information made available by the plaintiffs. The defendants did not reply to this communication. The Arbitrators before entering upon arbitration, selected one James F. Knight as Umpire and Chairman as required by the rules of the Association. Thereafter the Arbitrators and the Umpire entered upon arbitration and gave two awards, in the sum of $9,538.64 in respect of the first contract and in the sum of $9,209.36 in respect of the second

1963

Badat and Company v. *East India Trading Company*

Mudholkar J.

contract by way of damages. The plaintiffs thereupon drew a bill of exchange on the defendants at Bombay for $18,748 being the aggregate sum awarded by the two awards. According to them, though it was presented to the defendants several times in Bombay they "failed and neglected to accept or to pay the same."

Then, according to the plaintiffs, they adopted proceedings in the Supreme Court of the State of New York to have the said awards confirmed and judgment entered thereon. Notices of the proceedings were said to have been served on the defendants and judgment confirming the said awards and ordering the defendants to pay $19,554.17, including interest and costs, was pronounced on April 13, 1950. The plaintiffs eventually instituted the suit out of which this appeal arises in the High Court of Bombay on January 14, 1954.

According to the plaintiffs, the defendants have, by the terms of the contract voluntarily submitted themselves to the jurisdiction of the Supreme Court of New York and have agreed to the said Court, which was a Court having jurisdiction in that behalf, confirming the said awards and entering judgment thereon. Further, according to them, the parties had expressly agreed that judgment might be entered on any award that might be made in respect of any question, controversy or claim between the parties arising under or out of the said contracts in accordance with the practice of any Court having jurisdiction. Alternatively they have contended that if the Court held that the judgment was not a judgment of a foreign Court on which action would lie in the High Court the defendants having by the terms of the said contracts expressly agreed to have any dispute arising under the contracts settled by arbitration in New York under the rules of the Spice Trade Association and the arbitration upon which the awards are founded having been duly made and published according to the rules and laws of the State of New York and further having become final are binding on the defendants, the defendants are bound to carry out the terms of the said awards and to pay to the plaintiffs the sums awarded under them. Thus the suit is substantially based on a foreign judgment and in the alternative on the two awards given by a domestic

tribunal functioning in New York.

The defendants raised a number of pleas in defence. In the first place they said that they did not reside within the limits of the original jurisdiction of the High Court or carry on business therein and the High Court had no jurisdiction to entertain the suit. They further contended that no part of the cause of action had arisen in Bombay. It may be mentioned that the plaintiffs had sought for and obtained *ex parte* leave of the court under cl. 12 of the Letters Patent and the defendants submitted that the leave should be revoked. The next important contention of the defendants was that the Supreme Court of New York had no jurisdiction to pass the judgment and the order sought to be enforced. Further, according to them, the Arbitrators and the Umpire who gave the alleged awards on which the judgment of the Supreme Court was founded had no jurisdiction to make those awards. They raised a number of other pleas also and elaborate judgments have been delivered by Mody J. as well as by the appeal court consisting of Chagla C.J., and S. T. Desai J., dealing with those contentions. Upon the view we take on the question of the enforceability of the awards in question in the manner sought in this case it is not necessary to advert to those pleadings.

It was not disputed before us that the defendants had, at the date of suit, ceased to reside or carry on business within the limits of the original civil jurisdiction of the High Court of Bombay. The appeal court, while holding that the judgment of the Supreme Court of New York cannot be enforced against the defendants in a suit brought on the original side of the High Court took the view that the awards upon which the judgment is based can be enforced because they give rise to a cause of action and a part of that cause of action had arisen in Bombay. The reason why the judgment of the Supreme Court of New York could not be the foundation of the suit is, in the words of the learned Chief Justice, as follows :

> "The foreign judgment was passed in New York and the defendants did not reside and carry on business within jurisdiction at the relevant date. The only way that jurisdiction could possibly have been attracted was by an averment that there was an obligation

1963

Badat and Company v. *East India Trading Company*

Mudholkar J.

under the judgment on the part of the defendants to pay the amount in Bombay or that the defendants had undertaken the obligation to pay the judgment amount in Bombay. There is no such averment in the Plaint and in the absence of any such averment if the Plaint had been based only on the foreign judgment then we might have agreed with the learned Judge and held that the Court had no jurisdiction."

No doubt, the learned Chief Justice has further said that it was unnecessary to decide the matter finally because in his view the plaintiffs were entitled to the relief claimed on the basis of the awards. We may point out that Mr. Setalvad, who appeared before us for the plaintiffs, did not challenge the finding of the appeal court on this point and did not seek to argue that the judgment of the Supreme Court could furnish a cause of action to the plaintiffs in respect of the present suit.

We entertain no doubt as to the correctness of the view that the plaintiffs are not entitled to enforce the judgment of the Supreme Court against the defendants by a suit instituted on the original side of the High Court and therefore, we should ordinarily have let the matter rest there. Our reasons for agreeing with the High Court's conclusion on the point are, however, different and, therefore, it is necessary for us to state them. Before we do so, it would be desirable to examine the position regarding the enforcement of foreign awards and foreign judgments based upon awards. Under the Arbitration Protocol and Convention Act, 1937 (VI of 1937), certain commercial awards made in foreign countries are enforceable in India as if they were made on reference to arbitration in India. The provisions of this Act, however, apply only to countries which are parties to the Protocol set forth in the First Schedule to the Act or to awards between persons of whom one is subject to the jurisdiction of some one of such powers as the Central Government being satisfied that the reciprocal provisions have been made, may, by notification declare to be parties to the Convention, setforth in the Second Schedule to the Act. It is common ground that these provisions are not applicable to the awards in question. Apart from the provisions

of the aforesaid statute, foreign awards and foreign judgments based upon awards are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the common law on grounds of justice, equity and good conscience. We may add that in cases arising on the original side of the High Court of Bombay, English common law is applicable "as nearly as the circumstances of the place and the inhabitants admit" by virtue of cl. 19 of the Letters Patent read with cl. XLI of the Charter of the Bombay High Court.

The common law on the subject is crystallised thus as rule 198 in Dicey's *Conflict of Laws,* 7th edn. at p. 1056.

> "Rule 198(1) : A foreign arbitration award which has been rendered enforceable by a judgment in the country where it was given may be enforced by an action as a foreign judgment.
>
> (2) A foreign arbitration award which has not been rendered enforceable by a judgment in the country where it was given may be enforced by an action at the discretion of the court if the award is,—
>
> (a) in accordance with the terms of the submission agreement; and
>
> (b) valid according to the law governing the arbitration proceedings; and
>
> (c) (*semble*) final according to the law governing the submission agreement."

The position as summarised in *Russel On Arbitration,* 16th edn. is set out thus at p. 282 :

> "An award made by foreign arbitrators, which requires an enforcement order to render it enforceable by the local law, is not a judgment of a foreign tribunal which can be enforced by action in English courts.
>
> . . . . . .
>
> But an award which is complete and could be enforced in the country where it was made is enforceable in England at common law, quite apart from any rights given by Part II of the Act. (*Arbitration Act,* 1950—14 Geo. 6, c. 27)."

Dealing with actions upon foreign awards at common law, it is stated further at p. 283 thus :

> "To succeed in such an action the plaintiff must

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

prove :—

(1) That there was an arbitration agreement ;
(2) That the arbitration was conducted in accordance with that agreement ; and
(3) That the award was made pursuant to the provisions of the agreement and is valid according to the *lex fori* of the place where the arbitration was carried out and where the ward was made.

. . . . . .

If the award is validly made in consequence of a valid arbitration agreement, a sum found due by the award and unpaid may be sued for in an action upon the agreement."

Thus commercial arbitration awards, though based on a contract to arbitrate are not contracts and although they are decisions they are not judgments. Even though that is so, it has been held in several cases in England that even where an award has not been reduced to a judgment in a foreign country it can be enforced in England provided, of course, the award answers *mutatis mutandis* the tests for determining the enforceability of foreign judgments. Thus, the foreign arbitration tribunal must have acted upon a valid submission within the limits of jurisdiction conferred by the submission, and the award must be valid and final. (see Dicey's *Private International Law,* p. 1057). Then it is stated there :

"Others believe that enforcement in England must depend upon the nature of the award in the country where it was given. Thus, if the award must be, and has been, reduced to a judgment abroad, the judgment and not the award must be enforced in England. If the award gives rise to a claim in contract abroad, it must be enforced as a contract in England. However, as will be shown, this is not the view generally adopted by the courts, for the award is treated as a contract in England, no matter whether foreign law so regards it or not. Still others assert that the enforcement of an award in England is based not on the award, but on the contractual agreement to submit to arbitration all differences arising out of the original contract, on the ground that the submission to arbitration itself implies a contractual

agreement to abide by the award, thereby extinguishing the original cause of action."

After stating this, the learned author proceeds to say :

> "It is submitted that no one short formula is saisfactory and that the enforcement of a foreign award involves a complex of questions which must be treated separately."

He has then dealt with various decisions in England and also the opinions of certain writers. The conclusions stated in so far as they are relevant to this case are :—

1. In all enforcement proceedings in England the plaintiff must first obtain an enforceable title in England *i.e.,* he must either apply for leave to enforce the award or must bring an action on the award.
2. In an enforcement proceeding in England the action on the award must take the form of a claim in contract. This rule is based upon the assumption that the agreement to perform the award is implied in the submission and that the submission is the contract on which the action is based.
3. In order to be enforceable in England, the foreign award need not first be pronounced enforceable in the country of its origin. (see *Union Nationale des Cooperatives Agricoles de Cereales* v. *Robert Catterall & Co. Ltd.*(1) though there the award was being enforced under the Arbitration Act, 1950). If, however, the foreign award is followed by judicial proceedings in the foreign country resulting in a judgment of the foreign court which is not merely a formal order giving leave to enforce the award, enforcement proceedings in England must be brought on the foreign judgment or possibly on the original cause of action but probably not on the award. If the foreign judgment has the character of a formal order giving leave to enforce the award it is doubtful whether the foreign award or the foreign order is to be enforced in England. If the distinction between foreign judgments on the award and foreign

(1) (1959) 2 Q.B. 44.

1963

Badat and Company v. *East India Trading Company*

Mudholkar J.

formal enforcement orders can be maintained in practice, then, it is believed that the foreign award and not the foreign order, will be enforced in England, if the enforcement order is purely formal.

4. For the purpose of enforcing a foreign award plaintiff must prove only (1) submission, (2) compliance with the submission in the conduct of an arbitration and (3) the validity of the award according to the law of the country where it was made. This is also laid down in *Norske Atlas Insurance Co. Ltd.,* v. *London General Insurance Co., Ltd.,*(1) and according to the learned author this decision correctly indicates the conditions which must be fulfilled if a foreign award is to be enforced in England.

We may, however, mention that relying upon *Merrifield, Ziegler & Co.,* v. *Liverpool Cotton Association Ltd.,*(2) the learned Solicitor-General contended that an award should also be one which is enforceable in the country in which it was rendered without the aid of an enforcement order or a judgment. There, a German award was sought to be executed in England. Eve J., who decided the case, found that under the German law the award had the effect of a final judgment pronounced by a court of law. But it could not be enforced by execution unless an enforcement order was made by the Court and further no enforcement order will be made if any grounds exist for setting the award aside. In the course of his judgment the learned Judge observed :

> "It is not even as though the award were enforceable unless the court stays its operation ; the contrary is really the case, and for all practical purposes it is stillborn until vitality is infused into it by the court. It is then, for the first time, endowed with one, at least, of the essential characteristics of a judgment—the right to enforce obedience to it."

Dicey has pointed out that this is the only case where such a view has been taken and that it was not even referred to in the *Norske's case*(1). Nor was it referred to

(1) (1927) 43 T.L.R. 541. (2) (1911) 105 L.T.R. 97.

in the *Union Nationale case*(1). There, a Danish award, though not enforceable in Denmark in the absence of an enforcement order was held by the court of Appeal to be enforceable under the Arbitration Act of 1950 on the ground that it had become final and that under the Danish law only formal objections could be taken to such an award in the proceedings for obtaining an enforcement order.

It will thus be seen that there is a conflict of opinion on a number of points concerning the enforcement of foreign awards or judgments, based upon foreign awards. However, certain propositions appear to be clear. One is that where the award is followed by a judgment in a proceeding which is not merely formal but which permits of objections being taken to the validity of the award by the party against whom judgment is sought, the judgment will be enforceable in England. Even in that case, however, the plaintiff will have the right to sue on the original cause of action. The second principle is that even a foreign award will be enforced in England provided it satisfies *mutatis mutandis* the tests applicable for the enforcement of foreign judgments on the ground that it creates a contractual obligation arising out of submission to arbitration. On two matters connected with this there is difference of opinion. One is whether an award which is followed by a judgment can be enforced as an award in England or whether the judgment alone can be enforced. The other is whether an award which it not enforceable in the country in which it was made without obtaining an enforcement order or a judgment can be enforced in England or whether in such a case the only remedy is to sue on the original cause of action. The third principle is that a foreign judgment or a foreign award may be sued upon in England as giving good cause of action provided certain conditions are fulfilled one of which is that it has become final.

Bearing in mind these principles let us consider whether the judgment of the Supreme Court could be enforced against the defendants by instituting a suit on

(1) (1959) 2 Q. B. 44.

1963

Badat and Company v. *East India Trading Company*

Mudholkar J.

the original side of the High Court. The appeal court has, as already stated taken the view that the original cause of action having arisen wholly or in part within the limits of the original jurisdiction of the High Court, the suit was maintainable. If the plaintiffs were suing upon the original cause of action, there would have been no difficulty and the High Court could have granted leave under cl. 12 to the plaintiffs to institute the suit. But here, we are concerned not with the original cause of action but with the judgment of the New York Supreme Court and the award. The judgment furnishes an independent cause of action. The question would be whether the cause of action furnished by it arose within the limits of the original jurisdiction of the High Court. The judgment was rendered in New York and, therefore, the cause of action furnished by it arose at that place and not anywhere else. This cause of action is really independent of the cause of action afforded by the contract and, therefore, if advantage was sought to be taken of it, the suit would not lie at Bombay. This point does not appear to have come up for a direct decision in any case.

We may, however, refer to the decision in *East India Trading Co.*, v. *Carmel Exporters & Importers Ltd.*(1) There, an action was brought in England to enforce a foreign judgment awarding damages for breach of contract and the question for consideration was the relevant date for converting the amount of damages into sterling. After considering the relevant decisions on the point Sellers J., held that the relevant date would be the date of the foreign judgment. The ground given by him was that the plaintiff's cause of action was the foreign judgment and it is that judgment which creates the debt which was enforceable by action in England. The principle underlying this case should also apply to the present one because in both cases the cause of action is founded on foreign judgments, though in the case before us it is founded alternatively, upon foreign awards also. The only difference is that while in our case the question is where it arose, in the case cited the question was as to

(1) (1952) 2 Q.B. 439.

when it arose.

The reason why a foreign judgment should be deemed to create a new obligation has not been stated in this case. But it is to be found in the judgment of Blackburn J. in *Schibsby* v. *Westenholz*(1) where at p. 159 he has stated :

> "The true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke B. in *Russel* v. *Smyth*(2), and again repeated by him in *Williams* v. *Jones*(3) that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce ; ....."

As James L. J., has said in *Re Davidson's Settlement Trusts*(4) "It would be impossible to carry on the business of the world if courts refused to act upon what has been done by other courts of competent jurisdiction."

Schmitthoff in *The English Conflict of Laws,* 3rd edn. has stated at p. 459 :

> "The English courts recognise that a foreign judgment gives rise to private rights which, on principle, should be protected by them. Consequently, when referring to the recognition of a foreign judgment, what is actually meant is the *recognition of the private right that is created by the judgment* and not the enforcement of a foreign judicial act of State. In the words of Professor Read(5)—'The true basis upon which the Anglo-Dominion authorities.....place the recognition of a foreign judgment is that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district.'.....The view that the recognition of a foreign judgment in the English juris-

(1) (1870) 6 Q.B. 155. (2) (1842) 9 M & W 810.
(3) (1845) 13 M & W 628. (4) (1873) L.R./E. & 383, 386,
(5) "Recognition and enforcement of foreign judgments (1938)" by Prof. Read. Quoted by Schmitthoff in *"The English Conflict of Laws"* p. 459.

1963

Badat and Company v. *East India Trading Company*

Mudholkar J.

diction is based on the assumption that the foreign judgment creates a new legal obligation is firmly established by numerous decisions."

No divergent views have been expressed upon this question. No doubt, the English doctrine of merger has been consistently held in England not to apply to a foreign judgment with the result that despite the fact that a plaintiff has obtained a foreign judgment he may nevertheless sue in an English court upon the original cause of action instead upon the judgment. When he sues upon the original cause of action, no doubt, the court within whose jurisdiction the cause of action arose would be entitled to entertain the suit. But, if on the other hand, he chooses to sue upon the judgment, he cannot found jurisdiction for the institution of the suit on the basis of the original cause of action because once he chooses to rest himself on the judgment obtained by him in a foreign court, the original cause of action will have no relevance whatsoever even though it may not have merged in that judgment.

Since the judgment with which we are concerned was pronounced in New York the cause of action for a suit based thereon must be said to have arisen at that place. Since that is so, it follows that the cause of action in so far as it rests on the judgment, did not arise within the limits of the original jurisdiction of the High Court of Bombay and the suit based upon that judgment must be held to be beyond the jurisdiction of the Court.

The alternative claim of the plaintiffs is for the enforcement of the awards themselves and it is this which the Appeal Court has held to be one which can validly form the basis of the present suit. The learned Solicitor-General contended that the awards having merged in the judgment cannot afford a basis to the present suit. It is true that it is pointed out in Dicey's *Conflict of Laws* that some writers have expressed the view that where a foreign award must be, and has been, reduced to a judgment the judgment and not the award must be enforced in England. But it has also been pointed out that this is not the view generally adopted by the courts in the United States of America as would appear from the following passage from Lorenzen's *"Cases on Conflict of Laws"* 4th edn.

p. 1090 :

> "As a judgment of a foreign country is held not to merge the original cause of action, it would follow that an action might be brought upon the award, notwithstanding the fact that it has been converted into a judgment abroad."

This question was left open by the Privy Council in *L. Oppenheim & Co.*, v. *Mahomed Haneef*(1) as it had not been raised in that case. The recognition given to a foreign judgment by the English Courts is, as pointed out by Schmitthoff at p. 459 of the *English Conflict of Laws*, not based upon the doctrine of merger. For, this doctrine does not apply to judgments of courts which are not courts of record in the English sense. It may be that founded as the American legal system is on the common law of England the New York Supreme Court would be a court of record in the English sense and, therefore, the doctrine of merger could be said to apply to a judgment recorded by it. However, as no contention was raised before us that the Supreme Court of New York was a court of record, we would leave the matter there.

Just as a foreign judgment affords a fresh cause of action upon which a suit can be brought in an English court, so is the case with regard to a foreign award. Thus, in *Bremer Oeltransport GMBH* v. *Drewry*(2) it was held that a foreign award furnishes a new cause of action based on the agreements between the parties to perform the award. This view has been accepted in *Halsbury's Laws of England* Vol. II, p. 45. In that case it was contended for the respondents that in so far as the submission is a contract whereby the parties to it impliedly undertake to abide by and carry out the award of the arbitrators, the enforcement of the award would be the enforcement of a contract made within jurisdiction (the contract having been entered into in London while the award thereunder made at Hamburg in Germany). On the other hand it was contended for the appellant that the award having been made in Hamburg the action for its enforcement in England would not be an action for the enforcement of a contract made in England. Rejecting this contention Slesser

(1) I.L.R. 45 Mad. 496. (2) [1933] 1 K.B. 753.

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

L.J., after considering the authorities on the subject observed at p. 760:

> "So far it would appear clear that in the opinion both of common law and equity judges the award is to be regarded as merely the working out of a term of the original agreement of submission....."

and then referred to the following observations of James L.J., in *Llanelly Ry. and Dock Co.*, v. *London and North Western Ry. Co.*,(1):

> "It would be difficult to say that the real question between the parties could be determined by the arbitrator under that clause; because, if the plaintiffs are right in their contention, they have determined that part of the agreement as well as everything else."

Now, when a plaintiff sues upon a foreign award what he in fact does is to ask the court to pass a judgment in his favour for the amount stated in the award only after proving five facts:

(1) that there was a contract between the parties whereunder disputes between them could be referred to arbitration to a tribunal in a foreign country;
(2) that the award is in accordance with the terms of the agreements;
(3) that the award is valid according to the law governing arbitration proceedings obtaining in the country where the award was made;
(4) that it was final according to the law of that country; and
(5) that it was a subsisting award at the date of suit.

A view has been expressed in some English cases that an award must also be enforceable in the country in which is was made before a suit can be brought in England on its basis. But upon the view we are taking it is not necessary to decide this point. Now, when a suit is brought by a plaintiff on the basis of an award it is not necessary for him to prove that the amount claimed was actually payable to him in respect of the dispute nor is it open to the defendants to challenge the validity of such an award on grounds like those which are available in India under s. 30 of the Arbitration Act. A very limited challenge to the claim based

(1) (1873) L.R. 8 Ch. 942, 948.

on the award is permissible to the defendants and that is one of the reasons why it is important to ascertain whether the award has in fact attained finality in the country in which it was made. We will assume that the plaintiffs have satisfactorily established the first three of the five conditions which we have set out above. The question then is whether the fourth and the fifth conditions have been satisfied.

As to when an award can be regarded as final has been considered recently in the *Union Nationale* case(1). The facts of that case are succinctly summarised in the head-note and we can do no better than reproduce its relevant portion:

> "By an agreement in French made in Paris, dated August 31, 1956, the appellants agreed to sell to the respondents a quantity of wheat seed. The agreement contained an arbitration clause, the English translation of which was: 'All differences arising out of the present contract will be judged by the Arbitration Chamber of Copenhagen which will settle without appeal with the powers of an amicable arbitrator.' Differences having arisen between the parties they were referred pursuant to the arbitration clause to the Copenhagen Chamber of Arbitration. Under the rules regulating the procedure of the arbitration chamber, awards are made by a committee of the chamber. Regulation 14 of the rules provides that: 'awards made by the Committee .... shall be final. An award can only be appealed against to the appeal court attached to the committee.... If the presidency decides that the appeal cannot be made .... the award made by the judgment and arbitration committee shall be final....' By an order of October 6, 1958, the committee awarded to the respondents the sum of £ 183,000. The presidency of the arbitration committee on November 25, 1958 refused the appellants' application for leave to appeal and notified them that the award of October 6, 1958, was final. The award could not be enforced in Denmark without an order of a Danish court. The respondents, by summons under section 36 and 26 of the Arbitration Act, 1950, which applies to arbitration awards made in Denmark, applied for leave to en-

(1) (1959) 2 Q.B. 44.

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

force that award. The appellant claimed that the award was a foreign award and had not become final in the country in which it was made."

The contention raised on behalf of the appellants was that the award had not become final in the country in which it was made because it was not enforceable in that country. The Court of Appeal referred to regulation 14 which gives finality to an award made in accordance with the rules regulating the procedure of the arbitration chamber and accepted the opinion of a qualified Danish lawyer that according to the Danish law the award had become final, though it could not be enforced in Denmark without obtaining a judgment from a Danish Court and that during the proceedings before such court it would be open to the defendant to complain that the award suffered from formal defects but nothing else. Thus, in this case the Court of Appeal has drawn a distinction between 'finality' and 'enforceability' of an award and held that where under the laws of the country in which an award has been made, it is no longer open to challenge it on merits it must be regarded as final even though in the form in which it stands it may not be enforceable there. Rule 15, cl. (E) of the American Spice Trade Association whereunder the awards in the plaintiff's favour were made runs thus:

> "The award of such arbitrators and umpire or sole arbitrator shall be final and binding on both parties unless within three business days after receipt of the award, an appeal with a fee $75 be lodged with the Secretary of the Association by either disputant. Settlements under an arbitration award or awards of the Arbitration Committee shall be made within 10 days from the date of such award, and if not so settled, judgment may be entered therein in accordance with the practice of any Court having jurisdiction."

One point of distinction between the Danish rule and rule 15E of the American Rules is that the latter requires the obtaining of a judgment for enforcing it in case the claim arising out of the award is not settled. No doubt, the American rule also says that the award shall become final and binding on the parties but whether it takes away the jurisdiction of the courts to go behind its finality will have to be ascertained by reference to the laws of New York

State. For, that rule is no more than a term of the contract between the parties and must be subject to the laws of the State.

It would be desirable at this stage to compare foreign judgment with foreign awards and bear in mind the difference between them. No doubt, both of them create new obligations. The judgment of a foreign sovereign is a command of that sovereign which has to be obeyed within the territorial limits of that sovereign's jurisdiction. On the principles of comity it is, therefore, accorded international recognition provided it fulfills certain basic requirements. A foreign award, on the other hand, which is founded on a contract of the parties and is not given the status of a judgment in the country in which it is made, cannot claim the same international status as the act of a foreign sovereign. As pointed out by Schmitthoff on the *English Conflict of laws,* at p. 489 :

> "It follows that unless the plaintiff can satisfy the English court that the award is treated, in the country where it was made, like a judgment of the court he should sue on the original cause of action, but even in that case he should plead the award because it might in appropriate cases, be regarded by the English courts as conclusive between the parties."

These observations would perhaps now stand slightly modified by the view taken by the Court of Appeal in the *Union Nationale* case(1) in the sense that even an award which has not obtained the status of a judgment in the country in which it was rendered but which possesses an essential attribute of a judgment, that is, finality, it could be sued upon in another country.

Bearing in mind these principles we must consider what are the requirements of the laws of New York State for giving an award finality. In Appendix I to Sturges' Cases on *Arbitration Law,* the New York Arbitration Law, Art. 84 of the New York Civil Practice Act, as in force on September 1, 1952, has been set out. Section 1461 which deals with confirmation of an award runs thus:

> "*Motion to confirm award* : At any time within one year after the award is made, as prescribed in the

(1) (1959) 2 Q.B. 44.

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

last section, any party to the controversy which was arbitrated may apply to the court having jurisdiction as provided in section fourteen hundred fifty-nine for an order confirming the award; and thereupon the court must grant such an order unless the award is vacated, modified or corrected, as prescribed in the next two sections or unless the award is unenforceable under the provisions of section fourteen hundred fifty-eight. Notice of the motion must be served upon the adverse party or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the Supreme Court, the motion must be made within the judicial district embracing the country where the judgment is to be entered."

Then follows s. 1462 which deals with a motion to vacate award; s. 1462-a which deals with a motion to modify or correct an award; s. 1463 which deals with 'notice of motion and stay'; s. 1464 which deals with 'entry of judgment on award and costs'; s. 1465 which deals with the judgment-roll and s. 1466 which deals with effect of a judgment and its enforcement. It is clear from s. 1462 that in the motion to vacate an award a party to the arbitration can challenge the award on the following five grounds :

"1. Whether the award was procured by corruption, fraud or other undue means.
2. Where there was evident partiality or corruption in the arbitrators or either of them.
3. Where arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.
5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight."

It will thus be seen that despite the finality spoken of by

Rule 15E, this section enables the defendants to apply for vacating the award on certain grounds and thus imperil the finality accorded to the award by his contract. It is only after the objections under s. 1462 are disposed of that a judgment putting an end to all controversy, can be entered under s. 1464 which reads thus:

> "*Entry of judgment on award and costs*: Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this article. Costs of the application and of the proceedings subsequent thereto; not exceeding twenty-five dollars and disbursements, may be awarded by the court in its discretion. If awarded, the amount thereof must be included in the judgment."

After the judgment is pronounced a judgment roll is prepared and the judgment docketed as if it was rendered in an action. The effect of the judgment as enunciated in s. 1466 is as follows:

> "*Effect of judgment and enforcement*: The judgment so entered has the same force and effect, in all respects as and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."

From all these provisions it would be abundantly clear that the award has no finality till the entire procedure is gone through and that the award as such can never be enforced. What is enforceable is the judgment. There is no provision in the law providing for taking proceedings for the confirmation of an award in which all objections to the award could be made except s. 1461. The proceedings taken thereunder must, however, culminate in a judgment. In this respect the procedure under the law of the New York State is quite different from that under the Arbitration law of Denmark. Apparently, that is why the plaintiffs, after obtaining the awards, went up to the Supreme Court of New York for obtaining a judgment confirming the awards. No doubt, as a result of the judgment the decision of the arbitrators became unchallengable in the New York State and for all practical purposes in India as well but in the pro-

1963

Badat and Company
v.
East India Trading Company

Mudholkar J.

cess the award made by them has given way to the judgment of the Supreme Court of New York. It is this judgment which can now furnish a cause of action to the plaintiffs and not the awards.

No doubt, an award can furnish a fresh cause of action. But the award must be final. If the law of the country in which it was made gives finality to judgment based upon an award and not to the award itself, the award can furnish no cause of action for a suit in India. In these circumstances we hold that though the High Court of Bombay has jurisdiction to enforce a final award made in a foreign country in pursuance of a submission made within the limits of its original jurisdiction, the awards in question being not final, cannot furnish a valid cause of action for the suit. Upon this view we allow the appeal and dismiss the suit with costs throughout. The normal rule as to costs must apply because the choice of forum made by the plaintiffs was deliberate and with the knowledge that they were taking a risk in not seeking out the defendants at the place where they reside or carry on business.

By Court—Following the opinion of the majority, the appeal is allowed with costs.

Appeal allowed.